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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CRAIG NATHEN ROSENCRANS, Defendant and Appellant.	G055870 (Super. Ct. No. 12NF3827) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed as modified.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Lynne McGinnis, Amanda E. Casillas, and Chris Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Craig Nathen Rosencrans of attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a); all statutory references are to the Penal Code), and residential burglary (§§ 459, 460, subd. (a)). As to the attempted murder, the jury found true allegations defendant used a deadly weapon (§ 12022, subd. (b)(1)), and personally inflicted great bodily injury (§ 12022.7, subd. (a)). An allegation of premeditation and deliberation on that charge was found untrue. Defendant was acquitted of a count of criminal threats (§ 422, subd. (a)), and a count of the lesser included offense of attempted criminal threats (§§ 664, subd. (a), 422).

Defendant was sentenced to a determinate prison term of nine years, comprising a five-year low term for the attempted murder conviction, three years consecutive for the great bodily injury enhancement, and one year consecutive for the weapon use allegation. A concurrent four-year middle term sentence was imposed for the burglary conviction.

On appeal, defendant raises four claims: (1) There was insufficient evidence of an intent to kill to support his attempted murder conviction. (2) The trial court should have instructed the jury on a lesser included offense of aggravated assault. (3) The trial court erred by granting the prosecutor's pretrial motion to dismiss an alternatively charged count of assault by means of force likely to cause great bodily injury. (4) The trial court erred by refusing his request under section 654 to stay the concurrent sentence imposed on the burglary.

We reject defendant's first three claims. But we agree the sentence imposed on the burglary count should have been stayed under section 654. Therefore, we stay that sentence pursuant to section 654 and affirm the judgment as modified.

FACTS

Prosecution Case

Defendant and D.T.[1] started dating in 2009 and at one point were engaged to be married. In early September 2012, the relationship ended. Defendant later showed up at D.T.'s home unannounced, at places she went, and followed her to a class she attended. Defendant even broke into D.T.'s home and took her cell phone. D.T. told defendant he was not welcome, and he eventually signed an agreement to stop stalking her.

Following their break up, defendant and D.T. started seeing other people. D.T. resumed seeing D.B., whom she had known for 20 years and had dated before.

Defendant was jealous of D.B., and had made threatening remarks regarding D.B. to D.T. On September 18, defendant called D.B. and told him that he was dating D.T. and to stay away from her. He said, "If I see you, I'm not going to be cool."

Five minutes later, defendant sent D.B. a text message telling him: "Ey dick head Fuck off and die mother fucker! I'm a crazy jealous son of a bitch and ain't going to stand by and let you or anyone messing around with mylady ruining my relationship, one way or another, what ever it takes I will catch up with you and fuck you over or die trying! I intend to make you pay fr it! you're a stupid dumb fuck head for getting involved and not listening, I told you stay out asshole!! she tells me everything, you were together again the other nite, when she got home she called me and told me, then later she text me an said she loves me more than anyone ever, I'm not your average PW and your going to find out you Fucken with wrong sole!!! Maybe I'm just bluffing you, maybe I'm not 'e more."

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[1] California Rules of Court, rule 8.90(b) states that we "should consider referring to" certain individuals "by first name and last initial or, if the first name is unusual or other circumstances would defeat the anonymity, by initials only" in order to protect those individuals' privacy. Accordingly, we refer to the victims and witnesses in this case by their initials.

Ten minutes later, defendant sent D.B. a second text message, saying: "ey bro I'm just fucking with you [D.T.] wanted me to give you an apology, you two have been good friends and I shouldn't have gotten away with it, I sure that it was all innocent take care bro."

On Thanksgiving night of 2012, D.B. went to D.T.'s house. D.T.'s children were home, so he entered through the backyard sliding glass door into her master bedroom. The bedroom was lit by candlelight, light from the television, and an adjoining bathroom light. D.T. and D.B. began engaging in intimate activity on her bed. D.T. was clothed but D.B. was naked.

D.B. heard a sound he thought was an earthquake. Instead, it was actually defendant breaking into D.T.'s bedroom through the sliding glass door.

Defendant yelled to D.B., "you mother f'er, I told you that was my wife." He moved quickly to the bed and hit D.B. on the crown of his skull with a "log." D.B.'s head split open, and he started bleeding. D.B. got off the bed, rose to his feet, but defendant continued to swing the log or "club" like a "baseball bat," "hacking" "wildly," and "bashing" D.B. in the head.

D.B. pleaded with defendant to stop, but defendant persisted, "forcefully" swinging the log and hitting him again and again. In addition to hitting D.B. on the head, defendant struck his torso, shoulders, and every part of his body from the waist up. Throughout the attack, D.T. screamed for defendant to stop, but to no avail.

At one point, D.B. was able to stop the attack by grabbing defendant by the neck. As soon as D.B. let go, however, defendant resumed. D.B. tried to escape into the bathroom and close the door. Defendant stopped D.B. from closing the door, forced himself into the bathroom, and continued to attack. D.T. characterized defendant's attack as "brutal," and testified he was "smacking" D.B. continuously with the log, "bludgeoning" him.

D.T.'s adult son K.C. testified he heard a "crashing noise" coming from his mother's bedroom. He ran to the bedroom, but could not open the locked door. From outside, K.C. heard a male voice and his mother's voice. The male voice said something like: "That's my wife. Stay away from my wife."

K.C. broke the door open, and saw defendant holding D.B. by the hair, bending him over on all fours, and hitting him in the face repeatedly with the log. D.T. described the scene similarly. K.C. testified defendant had a piece of wood, or a "club," in his hand that was about two feet long and 10 inches in diameter. K.C. said defendant repeatedly brought the "wood" up to his shoulder level and then brought it down to hit D.B. in the face. K.C. saw blood "splatters" on the walls and on the ceiling.

K.C. yelled at defendant to stop. Defendant looked up at K.C., but continued to hit D.B. with the log. K.C. testified he could not remember exactly what defendant said, but he recalled feeling afraid and threatened. D.T. testified defendant had shouted at K.C., "I'm going to kill you."

K.C. ran out of the room, grabbed an empty bottle, and returned to the bedroom. When he got back, K.C. saw that defendant was still hitting D.B. with the log. K.C. ran towards defendant with the glass bottle and "raised [it] up like [he] was going to use it to swing against" defendant.

Defendant looked up at K.C., pushed D.B. towards him, and backed up towards the sliding door. Defendant said something like "you guys are crazy." K.C. threw the bottle at defendant, and defendant left through the sliding door. In the short time K.C. observed the beating, he saw defendant hit D.B. no fewer than 10 times, and the blows were without pause.

D.T. testified that at one point during the attack, she saw D.B. had weakened and started to go "limp." She estimated defendant struck D.B. on the head "at least 100 times," to the point where D.B. could no longer defend himself. When it ended, K.C. testified D.B. was "writhing . . . back [and] forth" in pain, with blood running down

his head and face. D.T said D.B. was bleeding so profusely that he looked "[l]ike the movie Carrie where the girl gets blood poured on her."

D.B. needed more than 40 staples on the front, back, and crown of his head to close his wounds. He also received stitches above one eye. His torso was heavily bruised, and his eye was swollen shut. The blows were sufficient for wood chips from the log to be left behind in the bedroom.

D.T. said defendant had cut up logs previously for her to use as firewood. They were consistent in size and shape with what defendant used to attack D.B.

Defense Case

Defendant testified that on Thanksgiving morning D.T. texted him, saying, "Happy Thanksgiving." At about 1:45 p.m., she came over to his house and told him she still wanted to get married. She told him she was not seeing anyone any longer and had stopped communicating with D.B. He asked her to accompany him to visit his family in Northern California. She said she would think about it, and told defendant to come over to her house that night to discuss it. Defendant took that to mean he should come over after midnight.

He said he went to D.T.'s home around 2:00 or 3:00 a.m., entered through a side gate, and went to the sliding glass door of the master bedroom, as was his custom. He called for D.T., speaking softly and lightly tapping on the glass, but did not hear any response.

Suddenly, a naked man appeared at the door and defendant thought D.T. might be in danger. The naked man stepped outside into the courtyard and hit defendant with a "hard blunt object." Defendant thought D.T. was being raped. After getting hit, defendant said he backed up, grabbed a "stick" from outside, and hit the naked man with it. He fought with the man, with the two hitting each other back and forth.

Defendant said K.C. came into the bedroom and threatened to kill him. He left because he was afraid, saying he knew K.C. owned guns. He traveled alone to

Northern California and, learning there was a warrant for his arrest, two days later turned himself in. He could not remember whether he took the "stick" he used to hit D.B. with him when he left.

Defendant's niece, cousin, ex-wife, and neighbor all testified as character witnesses, opining positively about his honesty and his general nonviolent character. Their opinions were not affected by the underlying details of the current case.

Prosecution Rebuttal Case

The prosecutor recalled D.B. He denied coming to the sliding glass door or ever coming outside to the courtyard. He insisted defendant did not hit him with a "stick," and described the weapon as white, uneven, and with knots on it. He later saw a pile of cut up logs on the side of D.T.'s house resembling what defendant hit him with; it was possibly a trimmed tree branch.

DISCUSSION

1. *Substantial Evidence Supports an Inference of an Intent to Kill*

Defendant first claims the attempted murder conviction cannot stand because there was insufficient evidence he acted with an intent to kill. We disagree.

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one." (*People v. Smith* (2005) 37 Cal.4th 733, 738 (*Smith*).) We "evaluate the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Ramos* (2016) 244 Cal.App.4th 99, 104.) We view the record in the light most favorable to the judgment, resolving all conflicts and indulging all reasonable inferences in support of the judgment.

"Regarding a specific intent element of a crime, we have explained that '[e]vidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.'

[Citation.] Moreover, the standard of review that applies to insufficient evidence claims involving circumstantial evidence is the same as the standard of review that applies to claims involving direct evidence. 'We "must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]" [Citation.] "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]" [Citation.] Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal. [Citation.]' [Citation.]" (*People v. Manibusan* (2013) 58 Cal.4th 40, 87 (*Manibusan*).)

Thus, if more than one inference may reasonably be drawn from the evidence, we accept the inference supporting the judgment. (*Manibusan, supra*, 58 Cal.4th at p. 87.) In doing so, we do not substitute our judgment for that of the trier of fact with respect to the credibility of witnesses. (*Ibid*.) "'A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict. [Citation.]' [Citation.]" (*Ibid*.)

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623.) A jury may infer the requisite specific intent from the defendant's acts and the overall circumstances of the crime. (*Smith, supra*, 37 Cal.4th at p. 741.) Moreover, while motive is not an element of a criminal offense, "evidence of motive is often probative of intent to kill." (*Ibid.*)

Here, the evidence that defendant harbored an intent to kill D.B. during his brutal attack is more than ample. Before his late night violence, when the already jealous

defendant learned D.B. and D.T. were dating, defendant threatened D.B., calling and telling him, "[i]f I see you, I'm not going to be cool." Moments later, defendant then texted D.B., threatening, "one way or another, what ever it takes I will catch up with you and fuck you over or die trying! I intend to make you pay fr it!" D.T. testified defendant had also made threatening remarks about D.B. to her.

Defendant's use of a piece of a tree limb, two feet long and 10 inches in diameter, to strike D.B. relentlessly on his head and face also evidences an intent to kill. Defendant did not use a "stick" to hit D.B., as he testified. Rather, he used a "log," more resembling a club, to bludgeon him multiple times. D.B. insisted the weapon was definitely a log, and stated it was similar to the firewood logs he saw located outside D.T.'s house. D.T. also saw the weapon when she was behind defendant, trying to stop the attack, when he "flung" her off. She was certain the weapon defendant was wielding looked "exactly" like the firewood logs he had previously cut for her.

Lying on the bed naked and defenseless, D.B.'s head was split open with defendant's first blow, followed by at least 100 additional blows according to D.T.'s testimony. Defendant ignored pleas from D.T., D.B., and K.C. to stop, and only stopped when K.C. threatened him.

D.B. attempted to retreat to the bathroom, but defendant followed and continued to hit him in the head with the log. At one point, defendant held D.B. by his hair with one hand, bent him over on all fours, and repeatedly hit him in the face. Even after D.B. stopped fighting back, became weak and went "limp," defendant still continued his attack. D.T. said defendant told K.C., "I'm going to kill you," when K.C. tried to intervene.

It was only when K.C. reentered with a bottle in his hand and advanced towards him that defendant finally stopped his barrage of blows.

D.B.'s injuries were severe enough that D.T. described him as looking like the title character in the film "Carrie" when a bucket of blood was poured over her head.

He received more than 40 staples on his head to stop the bleeding, and needed additional sutures for his eye.

Defendant argues these facts are all fully consistent with an inference that he did not possess the requisite intent to kill, and minimizes the threats, the injuries, the number of blows, and the size of the weapon he used. But that is not the standard we employ in reviewing a sufficiency of the evidence claim.

If more than one inference may reasonably be drawn from the evidence, we accept the inference supporting the judgment. (*Manibusan, supra*, 58 Cal.4th at p. 87.) "'A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict. [Citation.]' [Citation.]" (*Ibid*.)

This is not a close case. We have reviewed the record in light of the appropriate standard of review and find it amply supports an inference defendant intended to kill D.B. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793.) The jury was warranted in finding defendant guilty of attempted murder.

2. *Aggravated Assault Is Not a Lesser Included Offense of Attempted Murder*

Defendant next contends the trial court erred by not instructing the jury on a lesser included offense of aggravated assault. There was no error because aggravated assault is not a lesser included offense of attempted murder.

When defense counsel objected to the prosecutor's pretrial motion to dismiss an alternatively charged count of aggravated assault, she offered to withdraw her objection provided the court instruct the jury that aggravated assault is a lesser included offense of attempted murder. She recognized "it's not a lesser included unfortunately." The trial court never entertained her "offer," and the only lesser included offense instruction given was for attempted voluntary manslaughter. We review independently whether the trial court erred by failing to instruct on a purported lesser included offense. (*People v. Souza* (2012) 54 Cal.4th 90, 113.)

A trial court has a sua sponte duty to instruct on lesser included offenses when there is substantial evidence the defendant is guilty only of the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 118 (*Birks*).) "'To determine whether a lesser offense is necessarily included in a greater charged offense, one of two tests must be met. [Citation.] The "elements" test is satisfied if the statutory elements of the greater offense include all the elements of the lesser offense so that the greater offense cannot be committed without committing the lesser offense. [Citation.] The "accusatory pleading" test is satisfied if 'the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater [offense] cannot be committed without also committing the lesser [offense].'" (*People v. Stevenson* (2018) 25 Cal.App.5th 974, 984.)

A. The "Accusatory Pleading" Test

"[W]hen applying the accusatory pleading test to determine whether one offense is necessarily included in another, courts do not look to evidence beyond the actual pleading and its allegations regarding the purported greater offense." (*People v. Munoz* (2019) 31 Cal.App.5th 143, 156 (*Munoz*).) Here, the attempted murder accusatory pleading alleged simply that defendant "did unlawfully, and with the specific intent to kill, attempt to murder [D.B.], a human being." Thus, the charge tracked the statutory language and did not refer to any particular facts.[2] The accusatory pleading test is therefore inapplicable.

When "the accusatory pleading incorporates the statutory definition of the charged offense without referring to the particular facts, a reviewing court must rely on the statutory elements [test] to determine if there is a lesser included offense." (*People v. Robinson* (2016) 63 Cal.4th 200, 207; see *People v. Shockley* (2013) 58 Cal.4th 400, 404

[2] "Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187.) Section 664 provides the punishment for a "person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration."

[because the charges tracked statute's language without providing any additional factual allegations, focus is on the elements test].)

B. The "Elements" Test

In deciding whether an offense is necessarily included in another under the elements test, we ask whether "'"'all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.' [Citation.]"' [Citation.] In other words, 'if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' [Citation.]" (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.)

"'An attempt connotes the intent to accomplish its object, both in law [citation] and in ordinary language.' [Citation.]" (*People v. Smith* (1997) 57 Cal.App.4th 1470, 1481, fn. omitted, disapproved on other grounds in *People v. Williams* (2001) 26 Cal.4th 779.) "The act must go beyond mere preparation, and it must show that the perpetrator is putting his or her plan into action, but the act need not be the last proximate or ultimate step toward commission of the substantive crime." (*People v. Kipp* (1998) 18 Cal.4th 349, 376.)

"[M]urder can be committed without committing an assault with a deadly weapon or by means of force likely to produce great bodily injury. For example, one could commit a murder by withholding food and drink from an invalid. Therefore, the statutory definition of murder does not necessarily include assault with a deadly weapon." (*People v. Benjamin* (1975) 52 Cal.App.3d 63, 71.) This is equally true of attempted murder because "[i]t is clear an attempted murder may not involve an assault in certain circumstances." (*People v. Koontz* (1984) 162 Cal.App.3d 491, 496; see *People v. Young* (1981) 120 Cal.App.3d 683, 690 ["assault with a deadly weapon which requires an assault, not an essential element for attempted murder"].)

An attempt to commit a crime can be completed even though for some reason not discernable to the wrongdoer, the crime is not capable of commission. In

contrast, an assault requires the wrongdoer's "present ability" to commit the violent injury. (§ 240.) Thus, "'[a]n "assault" with intent to commit a crime necessarily embraces an "attempt" to commit said crime, but said "attempt" does not necessarily include an "assault."' [Citation.]" (*People v. Rupp* (1953) 41 Cal.2d 371, 382, overruled on other grounds by *People v. Cook* (1983) 33 Cal.3d 400, 413, fn. 13.)

Defendant cites *People v. Avila* (1960) 178 Cal.App.2d 700, where the court found aggravated assault necessarily included in the greater offense of the now defunct crime of assault with intent to commit murder. His reliance on the case is inapt because he conflates attempted murder with assault with intent to commit murder. Section 217 was repealed effective January 1, 1981. (Stats. 1980, ch. 300, §§ 1-2.) "By repealing section 217, the Legislature assured that all attempted murders would be punished under the general attempt statute [citation] *whether or not they involved assaults*." (*People v. Murtishaw* (1981) 29 Cal.3d 733, 763, fn. 24, italics added, superseded by statute on another point as recognized in *People v. Boyd* (1985) 38 Cal.3d 762, 772-773.)

In *Avila*, the defendant was charged with attempted murder and assault with intent to commit murder. The jury acquitted the defendant of the attempted murder and convicted her of assault by means of force likely to produce great bodily injury as a lesser included offense of the assault with the intent to murder. (*Avila, supra,* 178 Cal.App.2d at p. 701.) Attempted murder was therefore not before the *Avila* court.

Defendant quotes a passage from *Avila* where the court observed that, just as one cannot commit a murder without using means likely to produce great bodily injury, "neither can one who makes a violent assault with intent to commit murder be guiltless of an assault by means of force likely to produce great bodily injury." (*Avila, supra,* 178 Cal.App.2d. at p. 704.) However, the defendant in that case "was not found guilty of an offense included within that of attempted murder; she was found guilty of an offense necessarily included in the offense of assault with intent to commit murder."

(*Ibid.*) Put simply, the *Avila* case concerns different flavors of assault, and says nothing about attempted murder.[3]

Defendant's reliance on *People v. Johnson* (1978) 81 Cal.App.3d 380, is similarly inapt. It too involved an assault with intent to commit murder, and held that attempted murder is a lesser included offense of such an assault. (*Id.* at p. 389.) Indeed, the *Johnson* court pointed out "[a]ttempted murder . . . may be accomplished by means *other than assault*." (*Id.* at p. 388, italics added.)

Thus, defendant's argument that "one cannot act with intent to kill without using means likely to produce likely great bodily injury," is unsound. One can attempt a murder without committing an assault by means of force likely to produce great bodily injury. Consequently, under the "elements" test, aggravated assault is not a lesser included offense of attempted murder, and the trial court did not err in failing to instruct the jury otherwise.

3. *The People's Motion to Dismiss the Aggravated Assault Charge Was Not Erroneously Granted*

In addition to the attempted murder charge, defendant was originally charged with a count of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4).) Before the presentation of evidence began, the prosecutor moved to dismiss this assault count. The trial court granted the motion, stating: "Okay. Dismissed."

Defense counsel objected, arguing it was not in the interests of justice because the defense was relying on that count as a way for the jury to convict defendant of a less serious offense. The trial court responded it was granting the motion because the prosecution had the right to "control the proceedings as to what's charged."

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[3] See *People v. Christian* (1894) 101 Cal. 471, 474, overruled on another point in *People v. Lee Look* (1904) 143 Cal. 216, 220 "the attempt to commit a felony is always included in the assault with intent to commit the felony."

When asked by defense counsel how this dismissal was in the interests of justice, the prosecutor replied, "[the assault count] is charged in the alternative. In the interest of justice the People are moving to dismiss [it] so that the defendant is not convicted on two counts for . . . the same conduct." The court withdrew its earlier ruling, took the matter under submission, and later granted the People's motion to dismiss.

We review a court's decision to grant a motion to dismiss a charge for an abuse of discretion. (*People v. S.M.* (2017) 9 Cal.App.5th 210, 218.) In ruling on a dismissal motion, "a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

"'[T]he prosecution of criminal offenses on behalf of the People is the sole responsibility of the public prosecutor,' who 'ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek.' [Citations.]" (*Steen v. Appellate Division of Superior Court* (2014) 59 Cal.4th 1045, 1053-1054.) "[A]fter a valid [charging document] has been filed . . ., the prosecutor remains solely responsible for the conduct of the case [citation] and free to exercise postfiling discretion by moving to dismiss or reduce the charges." (*Id.* at p. 1055, fn. 4.) Prosecutorial discretion includes deciding "whom to charge, what charges to file *and pursue*, and what punishment to seek," (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 451, italics added) as well as "the conduct of a criminal action once commenced" (*id.* at p. 452).

"Dismissals under section 1385 may be proper before, during and after trial. [Citation.] Before trial, such dismissals have been upheld where designed to enable the prosecution 'to obtain further witnesses, to add additional defendants, to plead new facts, or to plead new offenses . . . .' [Citations.] Pretrial dismissals under section 1385 may also be used to effectuate plea bargains arranged between the People and the defense and approved by the court. [Citation.]" (*People v. Orin* (1975) 13 Cal.3d 937, 946-947.)

Defendant provides no authority where a trial court's grant of a *prosecutor's* motion to dismiss a charge prior to trial was found to be an abuse of discretion, nor have we found any. Instead, defendant focuses on the fact the dismissal prevented him from arguing to the jury that he was not guilty of the more serious attempted murder charge, and was at most guilty of the less serious aggravated assault. The argument proves too much, however, because it would also entail he was prevented from arguing he was only guilty of simple assault.

More fundamentally, this argument assumes a criminal defendant is entitled to control how the prosecution charges and presents its case. We reject such a premise.

Defendant contends this is a case where, without a lesser assault charge, the jury was left with only one possible charge with which to convict, and a dilemma of having to choose between conviction and outright acquittal. Not so.

Defendant was charged with premeditated and deliberate attempted murder, and the jury found this special allegation untrue. Similarly, the jury was also offered the lesser included offense of attempted voluntary manslaughter. Finally, there was the burglary charge, which alleged only that defendant entered with the intent to commit aggravated assault, not premeditated and deliberate attempted murder.

The prosecutor stated a dismissal was in the interests of justice because it would prevent the jury from convicting defendant of two different crimes for the same conduct. "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense . . . under separate counts . . . . The prosecution is not required to elect between the different offenses or counts . . . ." (§ 954.) Thus, although the prosecution was not required to elect between alternative charges in its initial pleadings, nothing in section 954 prevents it from later moving to eliminate the charges it finds inappropriate to pursue further.

Defendant insists the dismissal "unfairly thwarted" his right to present his defense. However, the right to present a defense is not a right to control the prosecution's

choice of charges, and defendant posits no authority for such a claim. Defendant's claim he was prevented from presenting his defense by the prosecutor's choice to proceed without the aggravated assault charge equates the right to present a defense with a right to have a jury instruction on a lesser *related* offense.

Defendant does not cite any case in which a court has held that a defendant's right to have the jury instructed on a possible defense theory of the case entitles a defendant to a jury instruction on an offense that is not a lesser included offense to the charged offense. None of the federal cases defendant cites in his brief so hold. His reliance on *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, is especially off the mark, as it involved a trial court's failure to instruct the jury on the affirmative defense of entrapment.

Moreover, such an argument would eviscerate *Birks*, because requests for lesser related offense instructions could be simply rechristened as "defenses." As explained in *Birks*, the rule requiring instructions on lesser included offenses flows from the trial court's duty under California law to provide instructions adequate for the case. The instructional rule implements this general duty in a manner that benefits both defense and prosecution. (*Birks, supra,* 19 Cal.4th at p. 119.) It preserves the prosecutor's discretion as to what offenses are to be charged, ensures that the defendant has adequate notice of the offenses alleged, and prevents both parties from "gambling on an inaccurate all-or-nothing verdict when the pleadings and evidence suggest a middle ground . . . ." (*Id.* at p. 127.) But this rule applies to *included* offenses, not *related* offenses.

Thus, *Birks* overruled *People v. Geiger* (1984) 35 Cal.3d 510, and explained that a defendant has no right to instructions on lesser related offenses not necessarily included in the charge. A different rule "would interfere with prosecutorial charging discretion, essentially allowing the defendant, not the prosecutor, to choose which charges are presented to the jury for decision . . . ." (*People v. Hicks* (2017) 4 Cal.5th 203, 211.) "We reasoned in *Birks* that granting a defense request for instructions

on uncharged lesser related offenses would interfere with prosecutorial charging discretion, . . . forcing the prosecution not only to prove the charged offenses but also to disprove any uncharged lesser related offenses that the defense might propose as an alternative. [Citation.] In other words, *Birks* makes clear that the goal of enabling a jury to return the most accurate verdict that the evidence supports does not require that every possible crime a defendant may have committed be presented to the jury as an alternative. Rather, a jury need only be instructed on offenses that the prosecution actually charged either explicitly or implicitly (because they were necessarily included within explicitly charged offenses)." (*Ibid*.)

Prosecutors routinely include alternative charges in their pleadings, both as a backup should later evidentiary problems arise, and to facilitate possible plea agreements. Defendant's insistence that the prosecutor is bound to his or her initial pleadings would lock prosecutors into their initial choices of how to charge and present their cases—often to the detriment of the defendants who could not later bargain for lesser charges. Once the matter is ready to go to trial, a prosecutor's decision to proceed without a backup lesser related charge is well within his or her discretion. Since no *new* charge has been added, and the defendant is already on notice of what he or she is being charged with, no prejudice results.

The trial court did not err in dismissing the assault charge.

4. *The Concurrent Sentence on the Burglary Charge Was Error*

Lastly, defendant contends the trial court erred by rejecting his argument that section 654 mandates he can only be punished once for the two substantive crimes for which he was convicted. We agree.

"Section 654, subdivision (a) provides that '[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.' ""'Whether a

course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'"' [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 353-354; *People v. Corpening* (2016) 2 Cal.5th 307, 311-312 (*Corpening*) [section 654 applies either when both offenses were completed by a single physical act or when a course of conduct reflects a single intent and objective].)

On the other hand, "'[I]f the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct. [Citations.]'" (*People v. Pinon* (2016) 6 Cal.App.5th 956, 968.) "'The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple.'" (*Ibid.*)

The Attorney General argues defendant harbored two distinct intents in this case: an intent to commit an aggravated assault upon D.B. formed prior to the entry, and an intent to kill D.B. formed after the entry and during the attack. The trial court appears to have reasoned similarly when it stated, "[a]t the time [defendant] entered he had not committed the [attempted murder], but he had completed [the burglary]. The actions after he entered then are what prove out [the attempted murder] in that he enters in and then he begins trying to kill the person who is in bed with his, the woman he's in love with." Thus, the argument goes, there were separate intents, and therefore separately punishable crimes. We are not persuaded.

We only consider whether a course of conduct reflects a single intent and objective or multiple intents and objectives, "if we conclude that the case involves more than a single act." (*Corpening, supra*, 2 Cal.5th at p. 311; see *People v. Mesa* (2012) 54 Cal.4th 191, 199 (*Mesa*) [multiple criminal objectives are a predicate for multiple

punishment only in circumstances that involve, or arguably involve, multiple acts].) "A defendant may not be punished more than once for a single physical act that violates multiple provisions of the Penal Code. . . . Where the same physical act accomplishes the actus reus requirement for more than one crime, that single act cannot give rise to multiple punishment." (*Corpening*, at p. 316.)

This is precisely the situation presented in this case. Here, defendant's single act of entering through D.T.'s sliding glass door with the "log" in his hand accomplished the actus reus of both burglary and attempted murder. It was the means by which he could attack D.B., and was therefore merely incidental to his ultimate jealousy fueled goal of beating D.B. to death with the tree limb. Consequently, the single act of entry could not give rise to separate punishments. (Cf. *Corpening, supra*, 2 Cal.5th at p. 316.)

On this point, *Neal v. State of California* (1960) 55 Cal.2d 11, overruled on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 334, is instructive. There the defendant threw gasoline into the bedroom of his two intended victims and ignited it. He was convicted of two counts of attempted murder and one count of arson. (*Correa*, at p. 15.) The court held "the arson was the means of perpetrating the crime of attempted murder" so punishment "for both arson and attempted murder violated . . . section 654, since the arson was merely incidental to the primary objective of killing [the victims] . . . . [Defendant], therefore, can only be punished for the more serious offense, which is attempted murder." (*Id.* at p. 20; see also *People v. Kynette* (1940) 15 Cal.2d 731, 762, overruled on another ground in *People v. Snyder* (1958) 50 Cal.2d 190, 197 [section 654 applies to attempted murder and malicious use of explosives convictions where the defendant placed a bomb in a car parked in victim's garage the night before it was triggered].)

It does not matter that the court imposed a concurrent sentence otherwise precluded by section 654, because defendant is still subjected to the term of both

sentences, even though they are served simultaneously. (*People v. Jones* (2012) 54 Cal.4th 350, 353.) Instead, if a defendant suffers two convictions and punishment for one is barred by section 654, "that section requires the sentence for one conviction to be imposed, *and the other imposed and then stayed*." (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592, italics added.) Therefore, the sentence imposed by the trial court on the burglary conviction should have been stayed under section 654.

Rather than remand the matter for resentencing, it is more appropriate for us to exercise our authority and modify the judgment to correct the unauthorized sentence. (§ 1260; see *People v. Alford* (2010) 180 Cal.App.4th 1463, 1473.)

DISPOSITION

The four-year concurrent sentence imposed by the trial court is stayed pursuant to section 654, and the judgment is affirmed as modified. The clerk of the superior court is directed to prepare an amended abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

THOMPSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

GOETHALS, J.